

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT  
SENTENCE BY A PERSON IN FEDERAL CUSTODY

<b>United States District Court</b>		District South Carolina (Charleston)	
Name (under which you were convicted): Fernando Rivas		Docket or Case No.: 2:11-cr-02290	
Place of Confinement: FCI Ashland		Prisoner No.: 23452-171	
UNITED STATES OF AMERICA		Movant (include name under which convicted) V. Fernando Rivas	

**MOTION**

1. (a) Name and location of court which entered the judgment of conviction you are challenging:

United States District of South Carolina at Charleston

(b) Criminal docket or case number (if you know): 2:11-cr-02290-PMD-1

2. (a) Date of the judgment of conviction (if you know): 9/26/2013 Amended Judgment 10/29/2013

(b) Date of sentencing: 9/24/2013

3. Length of sentence: 180 months concurrent imprisonment - lifetime concurrent supervised release

4. Nature of crime (all counts):

Count 1 - Production of Child Pornography - 18 U.S.C. 2251(a)

Count 2 - Transportation of Child Pornography - 18 U.S.C. 2252A(a)(1)

Count 3 - Possession of Child Pornography - 18 U.S.C. 2252A(a)(5) (B)

5. (a) What was your plea? (Check one)

(1) Not guilty ☐

(2) Guilty ☒

(3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or what did you plead guilty to and what did you plead not guilty to?

Guilty Plea to Count 1 and Count 2

Count 3 - Dismissed

6. If you went to trial, what kind of trial did you have? (Check one)

Jury ☐

Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing?

Yes ☐

No ☒

8. Did you appeal from the judgment of conviction?

Yes ☒

No ☐

9. If you did appeal, answer the following:

(a) Name of court: Fourth Circuit Court of Appeals

(b) Docket or case number (if you know): 13-4745

(c) Result: Affirmed

(d) Date of result (if you know): 6/3/2014

(e) Citation to the case (if you know): Unpublished

(f) Grounds raised:

1) Whether the District Court erred in denying Rivas' motion for Franks hearing and motion to suppress when false statements were included in the affidavit, no evidence was found connecting Rivas to child pornography on the confidential witness' computers or email, and the remaining assertions in the affidavit were bare legal conclusion; and 2) Whether the District Court imposed a procedurally and substantively unreasonable sentence when it applied a two-level enhancement even though no evidence established any sexual contact with the child, applied a two-level and five-level enhancement when no child pornography images were distributed by Rivas and failed to give proper weight to Rivas' history and characteristics.

(g) Did you file a petition for certiorari in the United States Supreme Court?

Yes

☐

No

☒

If "Yes," answer the following:

(1) Docket or case number (if you know): \_\_\_\_\_

(2) Result: \_\_\_\_\_

(3) Date of result (if you know): \_\_\_\_\_

(4) Citation to the case (if you know): \_\_\_\_\_

(5) Grounds raised: \_\_\_\_\_

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes ☒

No ☐

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: United States District Court of South Carolina at Charleston

(2) Docket or case number (if you know): 2:11-cr-02290-PMD-1

(3) Date of filing (if you know): 10/1/2013

(4) Nature of the proceeding: Motion to Amend Record

(5) Grounds raised: to include PSR of confidential informant as an attachment to Mr. Rivas' PSR

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(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☒

(7) Result: Order entered - Motion moot

(8) Date of result (if you know): 10/3/2013

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: \_\_\_\_\_

(2) Docket of case number (if you know): \_\_\_\_\_

(3) Date of filing (if you know): \_\_\_\_\_

(4) Nature of the proceeding: \_\_\_\_\_

(5) Grounds raised: \_\_\_\_\_

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(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: \_\_\_\_\_

(8) Date of result (if you know): \_\_\_\_\_

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

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12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.



**GROUND ONE:** Ineffective assistance of counsel in violation of Sixth Amendment to the United States Constitution.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Counsel failed to discuss with Petitioner the advisory guidelines and the implications of the guidelines before he entered his guilty plea. Petitioner was totally unaware when he entered his guilty plea to Count 1 and Count 2 that the lowest possible advisory guideline in his case was 235 months whether he was sentenced under 1 or 2 of the indictment. The provision in paragraph 13 of his plea agreement was basically meaning less. This paragraph provided that the government would dismiss Count 1 if the Court believed 18 U.S.C. Section 3553 factors justified a sentence less than the mandatory minimum of 180 months required under Count 1. However, the same paragraph provided that if the court believed the mandatory minimum was too severe, the court would sentence Petitioner in accordance to the guideline set forth for Count 2. The best possible guideline level for Count 2 provided a minimum of 235 months.

In reality, Petition's plea required at least a minimum sentence of 180 months which Petitioner was unaware of until he reviewed his Presentence Report. Petitioner, who at the time he was sentenced was 61 years old, believes the sentence imposed is essentially a life sentence.

As a result of the foregoing Petitioner's plea was unknowing and involuntary. Had he been fully advised of the sentence implications to his guilty plea, he never would have entered a plea.

**(b) Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

**GROUND TWO:**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

**(b) Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐

No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐

No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐

No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐

No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐

No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

**GROUND THREE:** \_\_\_\_\_

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): \_\_\_\_\_



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**(b) Direct Appeal of Ground Three:**

- (1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

- (2) If you did not raise this issue in your direct appeal, explain why:

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**(c) Post-Conviction Proceedings:**

- (1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

- (2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

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- (3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

- (4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

- (5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

- (6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

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(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

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**GROUND FOUR:** 

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(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

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(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

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(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: 

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Name and location of the court where the motion or petition was filed: 

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Docket or case number (if you know): 

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Date of the court's decision: 

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Result (attach a copy of the court's opinion or order, if available): 

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(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

Ground one, ineffective assistance of counsel, has not previously been presented in any federal court because this claim or claims rely primarily, if not exclusively, on evidence outside the record and, as such, are matters to be pursued in a collateral relief action, where a proper record can be developed.

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the you are challenging:
- (a) At the preliminary hearing:
- \_\_\_\_\_
- (b) At the arraignment and plea:  
David B. McCann, Esq., P.O. Box 978, Charleston, SC 29402
- \_\_\_\_\_
- (c) At the trial:
- \_\_\_\_\_
- (d) At sentencing:  
same as above.
- \_\_\_\_\_
- (e) On appeal:  
Russell Warren Mace, Esq., 1341 44th Avenue North, Suite 205, Myrtle Beach, SC 29577
- \_\_\_\_\_
- (f) In any post-conviction proceeding:
- \_\_\_\_\_
- (g) On appeal from any ruling against you in a post-conviction proceeding:
- \_\_\_\_\_
16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☒ No ☐
17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒
- (a) If so, give name and location of court that imposed the other sentence you will serve in the future:
- \_\_\_\_\_
- (b) Give the date the other sentence was imposed: \_\_\_\_\_
- (c) Give the length of the other sentence: \_\_\_\_\_
- (d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐
18. **TIMELINESS OF MOTION:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.\*
- Movant's sentence became final on October 6, 2014, the expiration of the 90-day period within which movant could have petitioned the United States Supreme Court for Certiorari to review the decision of the Fourth Circuit Court of Appeals. This Motion is being filed within the one-year period.
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\* The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.



Therefore, movant asks that the Court grant the following relief:

Vacate the Judgment and sentence; set the case for trial.

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or any other relief to which movant may be entitled.

H. Louis Sirkin (pro hac vice to be filed)

Ohio Bar 0024573

Santen & Hughes, LPA

600 Vine Street, Suite 2700

Cincinnati, OH 45202

Tel: (513) 721-4450

Fax: (513) 852-1994

/s Thomas R. Goldstein

Signature of Attorney (if any) Attorney for  
Thomas R. Goldstein Fernando Rivas  
Belk, Cobb, Infinger & Goldstein, PA  
2344 Cosgrove Avenue  
Charleston, SC 29405-7644

Tel: (843) 554-4291  
Fax: (843) 554-5566

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on \_\_\_\_\_

(month, date, year)

Executed (signed) on \_\_\_\_\_ (date)

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Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.